STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER TUCKER, by his Guardian, PAMELA WATSON,

Plaintiff-Appellant/Cross-Appellee,

v

VINCENT PIPITONE and VINCENT PIPITONE, JR., d/b/a PRO BUILT CONSTRUCTION, PRO BUILT CUSTOM BUILDING CORP., PRO BUILT CUSTOM BUILDING, INC., VINCE PRO BUILT, IMPROVEMENTS UNLIMITED INC.,

Defendants-Appellees,

and

RICHARD CARSON, d/b/a CARSON HOME MAINTENANCE,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
February 15, 2011

No. 294754
Oakland Circuit Court
LC No. 2008-095097-NO

Before: TALBOT, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

In this personal injury action, plaintiff Pamela Watson, as the guardian of plaintiff Christopher Tucker, appeals by leave granted the trial court's order granting summary disposition in favor of defendants Vincent Pipitone and Vincent Pipitone, Jr., who do business as Pro Built Construction, Pro Built Custom Building Corp, Pro Built Custom Building, Inc., and Vince Pro Built (collectively Pro Built). Defendant Richard Carson, who does business as Carson Home Maintenance, also cross-appeals the trial court's denial of his motion for summary disposition. On appeal, the primary issues are whether Pro Built and Carson owed a duty to Tucker that was separate and distinct from the duties imposed by their construction contracts. We conclude that the trial court correctly determined that Pro Built did not have a duty to Tucker that was separate and distinct from its duties under the construction contract and correctly determined that Carson did have a duty to Tucker that was separate and distinct from his contractual duties. As such, the trial court properly granted Pro Built's motion for summary

disposition and properly denied Carson's motion for summary disposition. However, we agree with Carson's contention that the trial court should have dismissed Tucker's strict liability claim and agree that Tucker's claims should be brought through a conservator or next friend. Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

Andrea Charles testified that she was the owner of Mavalena Assisted Care LLC, which operated an adult foster group home. Charles hired Pro Built to remodel the group home. Pro Built sub-contracted with defendant Richard Carson, who did business as Carson Home Maintenance, to perform the vinyl siding work on the project.

Tucker was a resident at the home and was legally blind. Although he could move about the home unassisted, he required arm-to-arm assistance when moving outside the home.

On October 17, 2005, Carson came to the home to perform siding work. He placed a twelve-foot long cardboard box containing vinyl siding near the group home's driveway entrance. After Carson placed the box, Charles assisted Tucker to the home's van. Charles stated that they could not exit through the home's driveway entrance side-to-side. For that reason, she assisted Tucker from behind by steadying him with a finger through a loophole in his pants. She stated that, as Tucker exited, he fell forward. Although she did not see how he fell, she noticed that there was a container placed by the entrance. When she asked who placed the container there, Carson told her that he had. In answer to interrogatories, Carson admitted that he saw Tucker walk right into the box and fall.

In October 2008, Tucker—through his guardian, Pamela Watson—sued Pro Built and Carson for damages resulting from his fall. Tucker alleged that all defendants were negligent, that they created a public and private nuisance, and that they were strictly liable for the hazard.

Carson moved for summary disposition in February 2009. He argued that he did not owe a duty to Tucker that was separate and distinct from his contract with Pro Built. As such, he maintained, he had no duty to Tucker that could support a claim for negligence. In March 2009, Pro Built also moved for summary disposition and adopted Carson's motion as its own. Pro Built also argued that Tucker's claims could not be brought through his guardian. The trial court denied both motions in May 2009.

In July 2009, Pro Built again moved for summary disposition. In support of this motion, Pro Built argued that it was undisputed that it was not on the work site at the time of the accident and that Carson placed the box that allegedly caused Tucker's fall. Because it could not be vicariously liable for the actions of its subcontractors and owed no duty that was separate and distinct from its duties under its construction contract with the home, it could not be liable for Tucker's injuries. Pro Built also argued that the hazard at issue was open and obvious.

Carson moved for summary disposition again in August 2009. In its motion, Carson argued that Tucker had not presented evidence sufficient to establish that the box at issue caused his fall.

The trial court agreed that Pro Built owed no duty to Tucker other than the duties imposed on it through its contract with the home. As such, it could not be liable for Tucker's injuries. On October 5, 2009, the trial court entered an order granting Pro Built's second motion for summary disposition. The trial court, however, concluded that there was a question of fact as to whether Carson's placement of the box caused Tucker's fall. For that reason, it denied Carson's motion in February 2010.

In February 2010, Tucker applied for leave to appeal the trial court's decision to dismiss Pro Built. This Court granted leave to appeal. See *Tucker v Pipitone*, unpublished order of the Court of Appeals, entered February 24, 2010 (Docket No. 294754). Carson then cross-appealed the trial court's decision to deny its motions for summary disposition.

In March 2010, the trial court stayed the lower court proceedings pending this Court's resolution of the appeal.

II. DUTY

A. STANDARDS OF REVIEW

Tucker first argues that the trial court erred when it determined that Pro Built did not owe a duty that was separate and distinct from its contractual duties. Specifically, Tucker argues that Pro Built had a duty to ensure that the work site was in a safe condition and to not endanger others through its actions. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Summary disposition under MCR 2.116(C)(10) is appropriate where "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

B. PRO BUILT'S DUTY

In order to establish a claim for negligence, a plaintiff must establish that the defendant owed the plaintiff a duty, breached that duty, and that the breach proximately caused the plaintiff to suffer damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Typically, whether a defendant owed the plaintiff a duty is a question of law. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992). The concept of duty encompasses whether the defendant owes the plaintiff an obligation to avoid negligent conduct. If no duty exists, there can be no actionable negligence. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 359; 584 NW2d 345 (1998).

The common law imposes a general obligation on all persons to perform actions reasonably in light of the apparent risk to others. *See Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977); *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967) (stating that the common law "imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person

or property of others."). That is, the common law imposes a duty on individuals and requires the individual to conform his or her own actions to the applicable standard of care. The common law does not, however, generally impose a duty on individuals to protect others from the actions of third persons. See *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988). As such, a person cannot normally be held liable for the negligent or intentional acts of another person. Indeed, it is well-settled that a general contractor—such as Pro Built—is generally not liable for the negligent acts of its independent sub-contractors. See *Latham v Barton Marlow Co*, 480 Mich 105, 112; 746 NW2d 868 (2008). Although there are exceptions to this rule, the exceptions are narrow and apply only to situations involving certain specific relationships. See *Dawe v Bar-Levav & Assoc, PC*, 485 Mich 20, 25-27; 780 NW2d 272 (2010) (noting that the common law recognizes that, based on the special relationship between a psychiatrist and his or her patient, the psychiatrist owes certain duties to protect the patient from third parties and to warn or protect third parties about dangers that the patient may pose); *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 221; 716 NW2d 220 (2006) (recognizing that an employer is vicariously liable for the acts of its employees that are committed within the scope of the employee's employment); *Ormsby v Capital Welding, Inc*, 471 Mich 45, 57; 684 NW2d 320 (2004) (stating that a general contractor may be liable for the negligence of independent contractors if the general contractor failed to take steps within its supervisory and coordinating authority and that failure created a high degree of risk to a significant number of workmen in a common work area). And none of those exceptions apply here.[1]

It is undisputed that Carson placed the box of vinyl siding that allegedly caused Tucker's fall—not Pro Built. It is further undisputed that Carson was not one of Pro Built's employees; he was an independent contractor whom Pro Built hired to perform the siding work. Accordingly, Pro Built cannot be vicariously liable for Carson's acts. See *Zsigo*, 475 Mich at 221. And, because the common work area exception does not apply here, Pro Built cannot be indirectly liable for the hazard created by Carson. See *Latham*, 480 Mich at 112.

Tucker argues that Pro Built owed him "the common law duty to use due care not to unreasonably endanger the person or property of others." But Tucker does not identify an affirmative act by Pro Built that might have caused Tucker's injury. Instead, Tucker notes that Pro Built did not put up caution tape, allowed Carson to create the hazard, failed to put in place safety rules, and failed to inspect the work site. These are not affirmative acts leading to harm,

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[1] Citing *In re Certified Question from the Fourteenth District Court of Appeals of Texas*, 479 Mich 498; 740 NW2d 206 (2007), Tucker argues that this Court should impose a duty on general contractors to maintain the safety of work sites. However, we are not at liberty to ignore longstanding precedent that delineates the duties owed by general contractors to workers in common work areas and to the general public. And those precedents clearly establish that a general contractor cannot be held liable for the acts of third parties absent application of the common work area exception. See *Ormsby*, 471 Mich at 57. And any change to the common law duties imposed on general contractors ought to be made in the first instance by our Supreme Court.

but failures to intervene to protect others from the acts of third parties. And, in the absence of an affirmative duty to act, the failure to act—nonfeasance—does not give rise to tort liability. See *Williams*, 429 Mich at 498-499; *White v Beasley*, 453 Mich 308, 328; 552 NW2d 1 (1996) (opinion by BOYLE, J.). Tucker also repeatedly refers to the fact that Pro Built was the general contractor for the site and that it hired Carson. However, the common law does not impose a duty on general contractors to safeguard third parties from the acts of its sub-contractors. Any supervisory role that Pro Built may have had—including any duty to erect barriers, control the actions of its subcontractors, and inspect the site—were duties imposed solely by contract, not by the common law. And, as our Supreme Court explained in *Fultz v Union Commerce Assoc*, 470 Mich 460, 466; 683 NW2d 587 (2004), duties that arise solely under a contract are not actionable in tort.

In *Fultz*, the plaintiff slipped and fell in a parking lot. *Id.* at 462. She later sued the contractor that had been hired to remove snow from the parking lot for failing to properly clear the lot. *Id.* On appeal, our Supreme Court considered whether a plaintiff can establish the duty element of her claim where the duty arose solely from a contract to which she was not a party to the contract. *Id.* at 463.

In considering the issue, the Court explained that Michigan courts had traditionally determined whether the claim was one based on misfeasance (action) in the performance of the contractual duty or for nonfeasance (inaction). Where the suit was premised on nonfeasance—that is, the failure to perform a duty under the contract—a tort action would not lie. *Id.* at 465-466. However, the Court concluded that such distinctions were "largely semantic and somewhat artificial." *Id.* at 466. For that reason, the Court instructed that courts should determine whether "the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie." *Id.* at 467. Applying the separate and distinct definition to the facts of its case, the Court in *Fultz* determined that the plaintiff failed to establish the requisite duty:

> In truth, plaintiff claims CML breached its contract with defendant Comm-Co by failing to perform its contractual duty of plowing or salting the parking lot. She alleges no duty owed to her independent of the contract. Plaintiff thus fails to satisfy the threshold requirement of establishing a duty that CML owed to her under the "separate and distinct" approach set forth in this opinion. [*Id.* at 468.]

Stated another way, because the contractor had no duty to clear the lot outside that imposed by the contract, it could not be liable in tort for failing to properly clear the lot.

The same flaw applies to Tucker's claims against Pro Built. Tucker has not identified any duty imposed by the common law—except the duty to refrain from taking actions that directly harm another—that could support his claims. And the evidence clearly shows that Pro Built did not create the alleged hazard—that is, Pro Built did not take any action that directly harmed Tucker. The only other theory that Tucker advances is that Pro Built had a duty to maintain the safety of the work site, but the common law does not impose such a duty on general contractors and, to the extent that Pro Built had a contractual duty to do so, that duty cannot support Tucker's claims either. *Id.* at 467.

The trial court did not err in dismissing all Tucker's claims against Pro Built.[2]

C. PRO BUILT'S STRICT LIABILITY

Tucker also argues that the trial court erred when it dismissed his claim against Pro Built premised on strict liability for maintaining a trap. Specifically, he argues that the trial court could not dismiss this claim because Pro Built did not address it in its motion for summary disposition. However, contrary to Tucker's assertion on appeal, Pro Built argued in its motion that all Tucker's claims should be dismissed. Pro Built presented evidence that it had no active involvement in the creation of the hazard at issue and did not own or possess the property. Because it could not—as a matter of law—be responsible for a hazard that it did not create and because it had no duty to maintain the work site in a safe condition, Pro Built concluded that Tucker had no "viable legal theory of liability." Indeed, Pro Built reiterated in closing its brief that the evidence showed that it was not responsible for the placement of the box and could not be liable "under any of the theories pled" by Tucker. As such, it argued that it was entitled to summary disposition.

Although Pro Built did not directly address Tucker's "strict liability" claim, a fair reading of Pro Built's motion and brief in support shows that Pro Built challenged the validity of each of Tucker's theories of liability on the grounds that Pro Built did not directly create the hazard and otherwise had no duty to remedy or prevent it. As such, Tucker was on notice that he had to respond by showing that there was a question of fact precluding the grant of summary disposition as to each claim, which he did not do. See *Barnard Mfg*, 285 Mich App at 369 (explaining that the level of specificity required when making a motion is that which would place the non-moving party on notice of the need to respond to the motion). Therefore, the trial court did not err when it dismissed this claim along with the others.

D. CARSON'S DUTY

On cross-appeal, Carson argues that the trial court erred when it denied his motion for summary disposition on the grounds that he had no duty to Tucker that was separate and distinct from his contract to install siding. Specifically, Carson argues that his placement of the box was an integral step in the process of installing the siding. As such, because he had no duty to install the siding outside that imposed by the contract, Tucker's claim of negligence must fail under our Supreme Court's decision in *Fultz*.

Here, it is undisputed that Pro Built hired Carson to install siding for the group home's remodeling. And, had Tucker alleged an injury premised on Carson's failure to install or to properly install the siding, that claim would be barred under the decision stated in *Fultz*. But

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[2] Given our resolution of this issue, we decline to address Tucker's arguments that his claims against Pro Built are not barred by the open and obvious doctrine and are not mere speculation and conjecture.

Tucker did not allege an injury premised on the failure to install or properly install the siding;[3] he alleged that Carson's actions directly caused him to fall and suffer injury. The distinction is between harms caused by the failure to perform the duty imposed under the contract and the failure to refrain from taking actions that unreasonably place others in danger. The former duty arises solely under the contract and the latter duty arises under the common law and applies to every action that a person takes. See *Moning*, 400 Mich at 437; *Clark*, 379 Mich at 261. Specifically, Tucker alleged that Carson negligently placed his building materials in a location where it would foreseeably cause persons exiting the group home to fall and injure themselves. That is, he alleged that Carson breached his common law duty to act in a manner that does not place others in unreasonable danger. See *Ghaffari v Turner Constr Co (On Remand)*, 268 Mich App 460, 466 n 5; 708 NW2d 448 (2005) (noting that the common law duty to act in manner that does not cause unreasonable danger to others continued even after the decision in *Fultz*).[4] Thus, Tucker alleged a claim involving a duty that was separate and distinct from the duty imposed under the contract. See *Fultz*, 470 Mich at 467.[5]

The trial court did not err when it refused to dismiss Tucker's claims on the basis that Tucker failed to establish that Carson had a duty that was separate and distinct from his contractual duties.

II. IMPROPER PARTY

A. STANDARDS OF REVIEW

Carson next argues that Tucker's guardian, Watson, does not have the authority to sue on Tucker's behalf. For that reason, he concludes, the trial court should have dismissed Tucker's suit under MCR 2.116(C)(5). This Court reviews de novo a trial court's determination on a motion for summary disposition. *Barnard Mfg*, 285 Mich App at 369. This Court also reviews de novo the proper interpretation of statutes and court rules. *Taylor v Kent Radiology*, 286 Mich App 490, 515; 780 NW2d 900 (2009).

B. ANALYSIS

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[3] Had Tucker alleged that Carson negligently installed the siding, which then fell and injured him, his claim would clearly arise solely from the duty imposed under the contract.

[4] The fact that a worker is performing under the terms of a contract does not relieve him or her of the duty to act reasonably. Thus, a worker operating a nail gun must operate it in such a way as to avoid shooting others even though he would not be operating the nail gun were it not for a construction contract and a delivery driver must drive in manner that is prudent and safe notwithstanding that he is making a delivery under the terms of a contract.

[5] Carson relies on a series of unpublished opinions for the proposition that actions taken in furtherance of a contract are immune from tort liability under *Fultz*. However, unpublished opinions are not binding precedent. MCR 7.215(C)(1). And we are not persuaded that the authorities cited stand for the proposition that he asserts.

The guardian for an incapacitated person has the powers conferred under the Estate and Protected Individuals Code. See MCL 700.1101 *et seq*. These include a limited power to bring suit with regard to his or her ward's property and to act as a special conservator. MCL 700.5314(b). If the guardian's ward does not have a conservator, the guardian may also bring suit against persons with duties to support or pay money for the ward's welfare. MCL 700.5314(d). Further, the power of a guardian to bring suit in his or her own name and on his or her ward's behalf has been recognized by statute and court rule. See MCL 600.2041; MCR 2.201(B)(1); see also MCR 2.420(A) (providing rules for the entry of a consent judgment, settlement or dismissal of an action "brought for a minor or a legally incapacitated individual by a next friend, guardian, or conservator."). Nevertheless, a guardian's power to bring suit is not as extensive as that granted to a conservator. Compare MCL 700.5423(2)(aa) to MCL 700.5314. And, with the exception of proceedings brought in probate, see MCR 5.001 *et seq.*, the court rules contemplate that a conservator will generally bring suit on an incapacitated individual's behalf. See MCR 2.201(E)(1)(a) (stating that an incompetent person's conservator may bring actions on behalf of the incompetent person). However, in the absence of a conservator, the rules allow the trial court to appoint a next friend to represent the incapacitated person. MCR 2.201(E)(1)(b). Accordingly, reading the court rules together, and in light of the powers provided to guardians by statute, we conclude that Tucker's claims should properly have been brought by a conservator or next friend.

However, we do not agree with Carson's contention that the proper remedy is to dismiss Tucker's claims under MCR 2.116(C)(5) (permitting a motion to dismiss to be brought where the party asserting the claim does not have the legal capacity to sue). The court rules do not provide for the dismissal of a suit brought on behalf of an incompetent person by someone other than a conservator. Rather, if "a minor or incompetent person does not have a conservator to represent the person *as plaintiff*," the lower court "shall appoint a competent and responsible person to appear as next friend on his or her behalf." MCR 2.201(E)(1)(b) (emphasis added). Because a guardian does have the authority to sue on his or her ward's behalf—even if limited—by filing suit on Tucker's behalf, Watson effectively commenced suit. See MCR 2.101(B). Moreover, MCR 2.201(E)(1)(b) does not limit the court's authority to appoint a next friend to those situations where suit has not yet been commenced. It merely requires a court to appoint a next friend for the incompetent person where the person otherwise has no conservator to represent him or her as plaintiff. Further, nothing precludes the trial court from appointing the guardian to serve as the incompetent person's next friend. Accordingly, we conclude that the proper remedy is to remand this matter to the trial court for appointment of a next friend on Tucker's behalf under MCR 2.201(E)(1)(b) and to order the amendment of the pleadings to reflect that appointment. See MCR 2.118(A)(2).

III. SUMMARY DISPOSITION OF STRICT LIABILITY CLAIM

Finally, Carson argues that the trial court erred when it denied its motion for summary disposition with regard to Tucker's claim that Carson maintained a trap. Specifically, Carson argues that this claim sounds in premises liability and it is undisputed that he did not own or possess the property at issue. Although it is not clear that Michigan recognizes a strict liability claim for traps placed on property, see Am Jur, Premises, § 214; *Williams*, 429 Mich at 500 (noting that a landowner's duty to others is not absolute), it is clear that Tucker's strict liability claim sounds in premises liability. Therefore, because there was no evidence to establish that

Carson owned or possessed the property at issue, the trial court should have granted Carson's motion with regard to this claim. See *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995) (stating that the common law imposes a duty on the possessors of land to protect certain classes of persons from harms on the land).

IV. CONCLUSION

The trial court did not err when it dismissed all Tucker's claims against the Pro Built defendants. The trial court also did not err when it denied Carson's motion for summary disposition premised on Tucker's failure to identify a duty that Carson owed to him that was separate and distinct from his contractual duties. However, the trial court did err when it denied Carson's motion to dismiss Tucker's strict liability claim and erred when it failed to appoint a next friend to represent Tucker in this suit. On remand, the trial court shall appoint a next friend for Tucker and order the amendment of the pleadings to reflect the appointment. The trial court shall also enter an order dismissing Tucker's strict liability claim.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Pro Built may tax its costs. However, because neither Tucker nor Carson prevailed in full, neither party may tax their costs. See MCR 7.219(A).

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Michael J. Kelly